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Supreme Court, U.S.
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No. 86-86

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

MARGUERITE COOPER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

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GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

MARGUERITE COOPER, 1/ ET AL.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Respondents, on behalf of a class of female Foreign Service Officers ("FSOs") and female applicants to become FSOs,

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1/ The case was originally captioned "Marguerite Cooper King, et al. v. United States, et al." in the district court. Subsequently, Ms. King notified the district court that she had legally changed her name to Marguerite Cooper, and the caption was modified.

brought this action in 1976 alleging that the Department of State discriminated against women both in their opportunities for hire as FSOs and in their employment opportunities after hire, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq. All claims relating to the initial hiring of female FSOs at the entry level were resolved on October 12, 1983, when the District Court for the District of Columbia approved a consent decree which provided, inter alia, that petitioner would appoint 75 class members as FSOs during the calendar years 1984 through 1987. The district court found that the settlement "eliminat[ed] seven previous years of hiring disparities, and carr[ied] a conservatively estimated monetary value of $8.6 million."

Pet. App. 12a.[2] The Consent Decree further provided that its entry by the court constituted a final action on the entry-level hiring portion of the case and entitled respondents to move the court for attorneys' fees and costs.

In December 1983, respondents applied for $416,736.03 in fees and expenses.[3] This request included hourly rates ranging from $75 to $150 per hour, depending on the level of experience of

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[2] "Pet. App." refers to the Appendices to the government's Petition for a Writ of Certiorari. "Pet." refers to the government's brief in support of its Petition.

[3] Respondents supplemented this request in July 1984 and again in December 1984, seeking an additional $52,966.81 in fees and expenses, thereby bringing respondents' total request to $469,702.84.

the individual attorney, and a 24% contingency adjustment. Respondents did not at that time seek an upward adjustment for the quality of representation on the ground that "[t]he quality of an attorney's work in general is a component of the reasonable hourly rate." Pl. App. for an Award of Attorneys' Fees and Expenses, p. 29 (December 12, 1983). Petitioner did not oppose either respondents' entitlement to an award of attorneys' fees and expenses as a prevailing party or the reasonableness of the hours spent by respondents' counsel. It challenged only the hourly rates at which compensation was sought, the contingency multiplier, and certain expenses.

On September 17, 1984, the district court awarded attorneys' fees and

expenses for all hours claimed at the hourly rates sought by respondents but allowed only a 20% upward adjustment for contingency rather than the 24% requested. The district court found that respondents' proposed rate schedule, ranging from $75 to $150 an hour depending upon the individual attorney's years of experience, was consistent with prevailing market rates for the Washington, D.C. community and accurately reflected both the complexity of the litigation and the "skill, experience and reputation" of counsel. Pet. App. 29a-34a.

Thereafter, the attorneys' fees litigation in these consolidated cases followed a tortuous path. Just 11 days after the district court's September 17, 1984, opinion, the Court of Appeals for

the District of Columbia Circuit decided Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (1984), certiorari denied, 105 S.Ct. 3488 (1985), which held that an attorney's actual billing rate is presumptively the market rate for his services. Petitioner moved for a stay of the district court's order awarding fees and moved for reconsideration in light of Laffey, supra. Due to the lengthy delay which would be necessitated by the district court's consideration of the new court of appeals' decision and any subsequent appeals, respondents moved the district court for an interim award of the uncontested portion of their fees and expenses. As a result, the district court made an award of $219,439.40, which represented the uncontested number of hours multiplied by counsel for

respondents' actual historic billing rates, plus expenses. Pet. App. 22a. In addition, in a separate interim order, the district court awarded respondents $38,222.81, which represented the difference between counsel's current and historic billing rates for these same hours. Pet. App. 20a.

Petitioner appealed both of the district court's interim orders. Petitioner presented no legal arguments in support of its appeal of the uncontested amount. Both orders were summarily affirmed by the Court of Appeals for the District of Columbia Circuit. Pet. App. 18a. Petitioner thereafter paid the uncontested amount and petitioned for a writ of certiorari as to the use of current rates. This Court granted the petition and vacated the judgment of the

court of appeals as to the use of current rates as compensation for delay in light of its decision in Library of Congress v. Shaw, 54 U.S.L.W. 4951 (July 1, 1986).

While the uncontested and current rates issues were on appeal, the district court issued its decision on petitioner's motion for reconsideration in light of Laffey, supra. Pet. App. 7a. Respondents argued that Laffey did not require the use of counsel's actual billing rates in this case, but that, if the court found to the contrary, it should adjust the lodestar upward by 55% to reflect the quality of counsel's representation. The district court found that counsel's actual current rates should be used to calculate the lodestar, but adjusted the lodestar upward by 54.75% in order to reflect its finding that counsel's

"services were equal in quality to those of attorneys charging that [higher] rate" and "far superior to what could be reasonably expected of attorneys charging a maximum of $65 per hour for associates and $80 per hour for partners." Pet. App. 12a.

The district court's total award after reconsideration, therefore, did not differ significantly from its original award. Since Laffey did not address the issue of the use of current versus historic rates, the district court did not reconsider its decision upholding the use of current rates. It used the law firm's current actual billing rates to arrive at the lodestar, then separately multiplied the merits lodestar by the 54.75% adjustment for quality and the 20%

contingency adjustment. No enhancements were made of the lodestar for the time spent litigating the attorneys' fee application itself.

Petitioner appealed and respondents cross-appealed the district court's modified award. In a brief unpublished opinion, the court of appeals (Judges Ginsburg, Scalia and Buckley) suggested that its own interpretation of Laffey might have led it to conclude that the use of counsel's actual billing rates was not appropriate in this case as "the firm's own rate may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community." Pet. App. 2a. However, in light of the "reasonable result achieved" and the "large respect we owe to district court assessments in these

matters," the court declined to disturb the award. Ibid.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

Respondents submit that the petition should be denied for the following reasons:

First, the litigation over this 1984 district court award of attorneys' fees and expenses has already been protracted. The government's petition for a writ of certiorari raises no questions of substantial importance. In fact, the government's petition does not even seek plenary review by this Court but merely asks the Court for summary reversal and a remand in light of other recent, and in the case of the contingency adjustment, pending decisions by this Court. This strategy will only serve to further pro-

long this litigation and, therefore, respondents submit that this Court should deny the government's petition.

Second, the government seeks a remand of the upward adjustment for quality awarded by the district court in light of this Court's recent decision in Delaware Valley. That case does not represent any change in the law since this court's earlier decision in Blum v. Stenson upon which the district court relied. Moreover, the award in this case, namely -- a lodestar based on counsel's normal hourly rates which the district court found to be far below prevailing market rates coupled with a quality adjustment intended to compensate counsel at market rates does not result in double counting and therefore is not affected by Delaware Valley.

Third, the government seeks a remand of the upward adjustment for contingency in light of this court's impending decision based on reargument in Delaware Valley. The district court correctly found, pursuant to this court's decision in Blum v. Stenson, that this was an exceptional case which justified an upward adjustment for contingency. The district court's findings should therefore only be disturbed if there was an abuse of discretion. The government's petition does not claim such an abuse. Here, the government seeks certiorari based only on the possibility of a future change in the law, which may or may affect the factual findings of the district court in this case.

Finally, the government seeks review of the fact that the lodestar, by

which the two upward adjustments in this case were multipled, was calculated based on counsel's current billing rates as a form of compensation for delay. Petitioner failed to present this issue to the court of appeals and the court, therefore, did not address it. As this court has frequently held, issues neither raised before nor considered by the court of appeals should not be addressed by this Court.

ARGUMENT

I. THE GOVERNMENT'S PETITION RAISES NO IMPORTANT ISSUES WARRANTING REVIEW BY THIS COURT

The courts have repeatedly warned against making attorneys' fee litigation as complex and difficult as the litigation on the merits. As this Court stated in Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), and reiterated in Blum v.

Stenson, 465 U.S. 886, 902, n. 19 (1984) a "request for attorney's fees should not result in a second major litigation." See also National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1324 (D.C. Cir. 1982); Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980) (Copeland III); Lindy Bros. Builders, Inc. v. American Radiator Standard Sanitary Corp., 540 F.2d 102, 116 (3rd Cir. 1976) (Lindy II"). As the Third Circuit stated in Lindy II, supra (540 F.2d at 116):

> [W]e did not and do not intend that a district court, in setting an attorneys' fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief.

The courts have also repeatedly emphasized that, in reviewing attorneys' fee awards, appellate courts should not reverse unless the district court has committed a clear abuse of discretion. As this Court stated in Hensley, supra, 461 U.S. at 437:

> We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.

See also Blum v. Stenson, supra, 465 U.S. at 886; Copeland v. Marshall, supra, 641 F.2d at 901; Lindy II, supra, 540 F.2d at 116; Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 166 (3rd Cir. 1973) ("Lindy I").

The broad discretion of the district

courts in making attorneys' fee awards is based on two considerations. First, the district court has far more familiarity with both the case and the activities and skill of counsel in the case. Hensley, supra, 461 U.S. at 437; Blum, supra, 465 U.S. at 886. Second, if the appellate courts substitute their judgment for that of the district courts, the losing parties will be encouraged to appeal all awards in the hope that the appellate court will come to a different result on at least some part of the district court's decision. The result will be to protract further attorneys' fee litigation and to burden further the caseloads of the appellate courts contrary to the frequently stated desires of the courts.

We submit that this Court should not encourage the government to prolong the

"second major litigation" it has already created in this case by granting this petition for certiorari. There are no special and important reasons for granting a writ of certiorari from the decision of the court of appeals. R. of S.Ct. 17. It raises no important, novel or recurring questions, nor does it present a conflict among the federal courts of appeals. Instead, this case basically involves whether there has been an abuse of discretion by the district court on what are essentially factual matters.

The court of appeals stated that the issues presented "occasion no need for an opinion by this court." Pet. App. la. Consequently, the court issued a one-paragraph memorandum in support of its affirmance of the district court's

decision awarding attorneys' fees and expenses to respondents. According to the Rules of the Court of Appeals for the District of Columbia Circuit, this unpublished memorandum may not be cited in briefs or memoranda of counsel as precedent, except for such purposes as application of the doctrines of res judicata, collateral estoppel and law of the case. D.C. Cir. R. 8(f). Therefore, the government is in effect asking this Court to review a district court decision which the court of appeals did not even deem of enough general importance to warrant a published opinion.

Moreover, the government is not asking this Court to decide any of the issues it has presented, but merely to remand the case to the lower courts for further consideration. It is not un-

likely that, after such reconsideration, the losing party will seek review in this Court.[4/] The opportunity for continued delay in the final resolution of the attorneys' fees at issue here is obvious. As stated by this Court in Magnum Co. v. Coty, 262 U.S. 159, 163 (1923):

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.

The district court, which had extensive first-hand knowledge of this case and of the work of respondents' counsel over seven years of litigation, carefully

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4/ For this reason, respondents request that, in the event this Court agrees to grant a writ of certiorari, it should grant plenary review rather than simply remand the case to the court of appeals for further consideration. See Respondents' Cross-Petition for a Writ of Certiorari, pp. 17-21.

set forth its reasoning for each aspect of its award. The court of appeals found (Pet. App. 2a):

> In view of the large respect we owe to district court assessments in these matters, and the reasonable result achieved, we can find no abuse of discretion in the fees and expenses awarded in the order on review.

Respondents submit that this Court should similarly give substantial weight to the well-exercised discretion of the district court and finally resolve this portion of the litigation by denying the government's petition for a writ of certiorari.

II. THIS COURT'S DECISION IN PENNSYLVANIA v. DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR DID NOT CHANGE THE LAW WITH RESPECT TO AN UPWARD ADJUSTMENT FOR QUALITY AND DOES NOT JUSTIFY A REMAND

Petitioner contends (Pet. 8) that a writ of certiorari should be granted and

a remand ordered concerning the upward adjustment made by the district court for quality of representation because of this court's recent decision in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 54 U.S.L.W. 5017 (July 2, 1986). We submit that Delaware Valley did not change significantly, if at all, the prior law on this issue and a remand is not warranted. Both Blum v. Stenson, supra, and Delaware Valley, 54 U.S.L.W. at 5022, hold that "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate * * *" used to calculate the lodestar. Indeed, the government's petition for a writ of certiorari quotes Delaware Valley, which, in turn, is quoting Blum. Pet. 7. On this issue, therefore, there

has been no change in the law since Blum was decided in 1984.

Moreover, Blum was decided prior to the district court's consideration of respondents' fee request and was correctly applied by that court. This Court held in Blum that (465 U.S. at 896, n. 11):

> [T]he burden is on the fee applicant to produce satisfactory evidence--in addition to the attorney's own affidavits--that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to--for convenience--as the prevailing market rate.

In its original opinion, the district court found that "[s]ome firms, including plaintiffs' counsel, charge rates that are 'reduced to reflect the financial constraints of their

clientele,' * * * and others--the 'public interest' bar-- charge nothing at all" (citation omitted). Pet. App. 31a. Citing Blum, the district court concluded that "actual rates do not necessarily reflect 'market value,' and market value is the touchstone of the fee inquiry." Id. at 32a.

In its subsequent opinion on reconsideration in light of Laffey, the district court felt constrained by the holding of that case to apply the firm's actual rates in its calculation of the lodestar. Pet. App. 11a.[5/] It held,

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5/ Respondents believe that the district court erred insofar as it held that Laffey required it automatically to apply the rates charged by respondents' counsel rather than market rates despite the fact that the evidence showed that the rates charged by respondents' counsel were far below prevailing market rates. This issue is dealt with in respondents' cross-petition for a writ of certiorari, at pages 11-17.

however, that those rates did not adequately reflect the quality of counsel's representation and the excellent results obtained. Id. at 12a. Moreover, it noted that, pursuant to its original opinion, it viewed counsel's services as of the caliber of firms charging prevailing market rates in the Washington, D.C. legal community for similarly complex federal litigation. The court's decision was based on considerable evidence in the record as to prevailing market rates, as well as its first-hand knowledge of the case and of counsel's work throughout the seven-year duration of the litigation. See Pet. App. 12a, 33a-34a. These findings should not be disturbed unless they are clearly erroneous.

In Blum, this Court held that "[t]he

'quality of representation[]' * * * generally is reflected in the reasonable hourly rate" which in that case was found to be $95 to $105 per hour for attorneys who had 1 1/2 years of experience or less as practicing attorneys. It therefore held that it was improper for the district court to award an additional 50% upward adjustment for the quality of representation, which would have been a clear example of double-counting.

Here, in contrast, the district court clearly did not engage in double-counting. Having previously determined that the work of respondents' counsel was superior and justified an award at prevailing Washington, D.C. rates (Pet. App. 33a), but believing itself constrained to award respondents' counsel a lodestar

amount based on substantially lower hourly rates, the court found that an upward adjustment equal to the difference between these two sets of rates was justified. The district court's use of an upward adjustment for quality was, therefore, simply a means of compensating for the fact that the lodestar amount did not reflect "the reasonable hourly rate" for respondents' counsel's services.

Delaware Valley is likewise inapposite. In that case this Court noted that, although the lower court had found the quality of representation to be superior, this finding was contradicted by the court's finding that only 324 out of 620 hours should be compensated. 54 U.S.L.W. at 5022. In contrast, in this case, the government conceded the reasonableness of the hours expended. In addition, the

district court independently reviewed the hours and found all hours claimed to be justified (Pet. App. 28a, n. 1):

> Plaintiffs claim a total of 2746.63 hours devoted to merits issues, and 642.25 hours to the fee litigation. The application carefully distinguishes between time devoted to the 'employee' and to the 'applicant' portions of the case, and offers a reasonable method for compensating efforts common to both claims. Furthermore, counsel's 'billing judgment,' as articulated and as applied, cannot be criticized. Counsel exercised it in a conscientious and fair manner throughout. [citations omitted]

In Delaware Valley, this Court also considered the fact that the lower court found that a substantial number of hours were performed by a more experienced attorney but "could have been done by an attorney working at the associate level" and other work "required little or no legal ability." 54 U.S.L.W. at 5022.

In contrast, in this case, the district court found that "[b]ecause of the firm's policy of assigning primary responsibility at any given time to one or two associates, attorneys in the 4-7 and 8-10 year categories ($95-110) [per hour] performed most of the work." Pet. App. 29a.

Furthermore, the opinions of the courts below in this case are fully consistent with the only other court of appeals' decision since Blum on this issue. Garrity v. Sununu, 752 F.2d 727, 739-740 (1st Cir. 1984), is remarkably similar to the case at bar. In that case, the district court had awarded lodestar hourly rates of $60 per hour and $45 per hour based on counsels' normal billing rates and then adjusted the lodestar upward to reflect the quality of the

representation and the exceptional results. Id. at 739. While suggesting, as did the court of appeals in this case, that "certain of the qualities sought to be recognized by the bonuses might better have been recognized by means of more adequate hourly rates," the First Circuit affirmed the lower court's award due to the fact that there was no double counting, there were exceptional results and both counsel's request and the district court's decision were well documented. Id. at 740.

Similarly, in this case, there was no double counting. The district court's award of an upward adjustment does no more than bring counsel's rates up to the level of prevailing market rates. Moreover, the district court found the results to be exceptional and pointed out

that the settlement "eliminat[ed] seven previous years of hiring disparities, and carr[ied] a conservatively estimated monetary value of $8.6 million." Pet. App. 12a. Respondents' request for fees was also well-documented (Pet. App. 45a):

> In this case plaintiffs filed a comprehensive, reasonable and thoroughly documented fee request. Plaintiffs attached all the required baggage. There are affidavits, resumes, and time slips. It was an eminently professional effort, fully in accord with the letter and spirit of Copeland III [Copeland v. Marshall, supra] and Concerned Veterans [National Association of Concerned Veterans v. Secretary of Defense, supra].

In short, the district court faithfully followed the law on quality adjustments as promulgated by this Court. It made all the relevant findings based on a careful review of the evidence. Its proper exercise of discretion should not

be disturbed.

III. THIS COURT SHOULD DENY CERTIORARI ON THE ISSUE OF THE CONTINGENCY ADJUSTMENT

Petitioner asserts (Pet. 8) that this case should either be held in this Court or remanded to the court of appeals and held there until the issue of contingency adjustments in Delaware Valley has been decided by this Court in the coming Term.[6/] 54 U.S.L.W. at 5023.

6/ Respondents submit that, due to the interrelationship of the issues in this case, it is undesirable that a portion of this litigation be retained by this Court while other issues are summarily remanded, as requested by petitioner. Fragmentation of this case, while proposed as a means of expediting consideration of those issues that appeared to be relatively simple, has resulted in the division of the attorneys' fee litigation in this case into several smaller cases that have proceeded independently through the court system. Respondents urge the Court not to fragment this portion of the case even further.

Respondents submit that this issue does not justify further delay in the resolution of the attorneys' fee issues in this case.

This Court, of course, does not sit to correct all errors which might be contained in lower court decisions, but only to decide important questions of law. See, e.g., Stern & Gressman, Supreme Court Practice, p. 258 (5th ed. 1978). Here, the important issues as to contingency adjustments will be decided in another case. The amount involved in this case ($36,364.03) is plainly not enough to make this case of intrinsic importance separate from any legal issues involved.[7/] Consequently, regardless how

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7/ While this sum is insignificant in the context of the United States Government's budget, it is by no means insignificant

the issues regarding contingency adjustments are resolved in Delaware Valley, there is no reason for granting the petition for a writ of certiorari here because of the contingency adjustment.

Moreover, the district court issued a careful, well-reasoned opinion justifying the 20% upward adjustment for

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to respondents' counsel and we strenuously object to the government's assertion that "withholding a final disposition here pending the outcome in Delaware Valley would not delay payment in an inequitable manner." Pet. 8, n. 6. The inequity is even clearer now in light of this Court's decision in Library of Congress v. Shaw, supra, that sovereign immunity bars a claim for post-judgment interest on the sums at issue in this case. The district court's initial award was made almost two years ago. Even assuming a modest simple interest rate of 8%, the delay has already cost respondents and their counsel almost $25,000 in lost earning power. Further delay of the entire case for the purely speculative purpose of awaiting reargument in Delaware Valley of an issue which is contained in only a part of the present case is obviously inequitable.

contingency in this case. Pet. App. 36a-43a. This analysis was undertaken subsequent to this Court's decision in Blum, which made clear that such adjustments were only appropriate in exceptional cases. The district court's findings that such exceptional circumstances existed in this case should, therefore, only be disturbed if there was an abuse of discretion.

The court stated several cogent reasons why a 20% upward adjustment for contingency was appropriate. First, as the court noted, there was both legal and factual uncertainty "on the critical issue of employment test validation." Pet. App. 43a. Second, Title VII "[c]lass actions involve efforts beyond those associated with an ordinary lawsuit," including the need for massive and

expensive expert statistical evidence. Ibid. At the time the Consent Decree was entered, there were in excess of 30,000 members of the class. Therefore, the district court concluded that "a contingency adjustment is 'necessary to facilitate the filing' of cases of this type, where both the scope of the claims and the number of complainants are atypical." Ibid. (quoting Murray v. Weinberger, 741 F.2d 1423, 1432 (D.C. Cir. 1984)).

Respondents submit that there is no justification for a writ of certiorari to be granted simply because of the possibility of a future change in law, which may or may not affect the facts of this case. The government's petition offers no authority for holding a case open in anticipation of a decision which has not even been rendered.

IV. THIS COURT SHOULD DECLINE TO ADDRESS AN ISSUE NOT RAISED BEFORE OR ADDRESSED BY THE COURT OF APPEALS

Petitioner also requests (Pet. 6-7) that a writ of certiorari be granted because the lodestar by which the two upward adjustments were multiplied was calculated based on counsel for respondents' current billing rates at the time of its application for an award of attorneys' fees in December 1983 rather than the appropriate historic rates throughout the pendency of the litigation on the merits from 1976 through October 1983.

In its brief in the court of appeals, petitioner stated the issues it sought to present to that court as follows (Gov. C.A. Br., unnumbered page entitled "Issues Presented"):

> Whether the District Court erroneously awarded a 54.75% enhancement of the attorneys' fees lode-

> star for "quality of representation" concerning the settled portion of the merits of the case, and a 20% upward adjustment for "contingency," characterizing this case as "exceptional" under Blum v. Stenson, 104 S. Ct. 1541 (1984), on both counts.

Petitioner neither raised, nor substantively addressed in its brief the issue whether current billing rates were appropriately used to arrive at the merits lodestar to which the multipliers were added. On the contrary, petitioner specifically stated that "the District Court's use of current rates to calculate the attorneys' fees lodestar is not an issue in this appeal," apparently because the law concerning that issue in the District of Columbia was settled. Gov. C.A. Br. 5, n. 1. Petitioner attempted, by way of a footnote in its Reply Brief in the court of appeals, to preserve the issue by simply asserting that it did not

waive the issue. Gov. C.A. Rep. Br. 10, n. 5. As a result, the court of appeals did not even mention this issue in its opinion.

As this Court has held, issues neither raised before, nor considered by, the court of appeals are not properly before this Court. EEOC v. Federal Labor Relations Authority, 54 U.S.L.W. 4408, 4409 (April 29, 1986); Rogers v. Lodge, 458 U.S. 613, 628, n. 10 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, n. 2 (1970); Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); Huty v. United States, 282 U.S. 694, 701-702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927).

In circumstances similar to those here, the petitioner in Adickes v. S.H. Kress & Co., supra, sought to amend his

complaint in district court to include a claim for liquidated damages under Sections 1 and 2 of the Civil Rights Act of 1875. The record showed that the petitioner had never raised the issue before the court of appeals, apparently because of the existence of settled law on point. 398 U.S. at 147, n. 2. This Court declined to address the issue on the grounds that it had not been raised before or addressed by the court of appeals. Ibid.

CONCLUSION

None of the Court's reasons for granting a writ of certiorari are present in this case. There exists no conflict among the circuits. There are no questions of substantial importance under the Constitution, statutes or treaties of the United States. There is not even a re-

ported decision of the court of appeals which could serve as precedent in other, future cases. In these circumstances, the government's petition for a writ of certiorari should be denied.

Respectfully submitted,

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